

31 December 1997

MODEL MEMORANDUM OF AGREEMENT FOR ACCEPTANCE AND RETURN OF CONTRIBUTED
OR ADVANCED FUNDS FOR DESIGN, CONSTRUCTION, MAINTENANCE, OR OPERATION

MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND THE
[FULL NAME OF NON-FEDERAL CONTRIBUTOR]
FOR ACCEPTANCE AND RETURN OF [SELECT ONE: CONTRIBUTED/ADVANCED] FUNDS
FOR THE [SELECT ONE: DESIGN, CONSTRUCTION, MAINTENANCE, OR
OPERATION (OF THE _____ FEATURE)]
OF THE [FULL NAME OF PROJECT]

This MEMORANDUM OF AGREEMENT (hereinafter referred to as the "MOA"),
entered into this _____ day of [MONTH], [YEAR], by and between the
DEPARTMENT OF THE ARMY (hereinafter referred to as the "Government"),
represented by the [SELECT ONE: [FOR ADVANCED FUNDS, OR CONTRIBUTED FUNDS
IN THE AMOUNT EXCEEDING \$2 MILLION FOR ALL CATEGORIES OF WORK AND LESS
THAN \$2 MILLION FOR CATEGORIES OF WORK NOT DELEGATED TO DISTRICT
ENGINEERS - Assistant Secretary of the Army (Civil Works)], OR, [FOR
CONTRIBUTED FUNDS IN THE AMOUNT OF \$2 MILLION OR LESS FOR CATEGORIES OF
WORK DELEGATED TO DISTRICT ENGINEERS - U.S. Army Engineer for the
[LOCATION OF DISTRICT] (hereinafter the "District Engineer")], and the
[FULL NAME OF NON-FEDERAL SPONSOR] (hereinafter the "Contributor"),
represented by the [TITLE OF THE PERSON SIGNING THE AGREEMENT].

WITNESSETH THAT:

WHEREAS, the [NAME OF THE AUTHORIZED FEDERAL NAVIGATION OR FLOOD
CONTROL PROJECT] (hereinafter referred to as the "Project") was
authorized by [CITE SECTION/SUBSECTION] of the [CITE PUBLIC LAW NAME AND
NUMBER]; and

WHEREAS, the Water Resources Development Act of 1986 (Public Law 99-
662) specifies the cost-sharing requirements applicable to the Project;
and

[INCLUDE THE FOLLOWING PARAGRAPH ONLY FOR ADVANCED FUNDS: WHEREAS,
the Contributor has expressed a desire to eventually serve as the Non-
Federal Sponsor that will share in the costs of the project pursuant to
Public Law 99-662; and]

WHEREAS, the Contributor considers it to be in its own interest to
expedite the [SELECT ONE: DESIGN, CONSTRUCTION, MAINTENANCE, OR
OPERATION] of the Project by voluntarily [contributing/advancing] funds
(hereinafter referred to as [Contributed/Advanced] funds) to be used by
the Government for that purpose; and

[FOR CONTRIBUTION OF FUNDS FROM PRIVATE PARTIES FOR AUTHORIZED NAVIGATION PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 560, to accept contributed funds, to be expended in connection with Federally appropriated funds, for any authorized work of public improvement of rivers and harbors whenever such work and expenditure may be considered by the Chief of Engineers to be advantageous to the interests of navigation; **[OR]**

[FOR CONTRIBUTION OF FUNDS FROM STATES AND POLITICAL SUBDIVISIONS FOR AUTHORIZED FLOOD CONTROL PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 701(h), to accept contributed funds, to be expended in connection with Federally appropriated funds, for any authorized flood control work whenever such work and expenditure may be considered by the Secretary of the Army on recommendations of the Chief of Engineers to be advantageous in the public interest; **[OR]**

[FOR ADVANCED FUNDS FROM LOCAL INTERESTS FOR AUTHORIZED NAVIGATION PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 561, to accept and expend advanced funds; **[OR]**

[FOR ADVANCED FUNDS FROM LOCAL INTERESTS FOR AUTHORIZED FLOOD CONTROL PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 701(h)(1), to accept and expend advanced funds; **[OR]**

[FOR CONTRIBUTION OF FUNDS REQUIRED OF NON-FEDERAL PUBLIC BODIES FOR AUTHORIZED PROJECTS] WHEREAS, the Government is authorized pursuant to 42 U.S.C. Section 1962d-5c (Section 40 of Public Law 93-251), to accept and expend cash contributions paid in annual installments during project construction; **[OR]**

[FOR CONTRIBUTION OF FUNDS REQUIRED OF NON-FEDERAL BODIES FOR PERFORMING ENGINEERING AND DESIGN OF AUTHORIZED WATER RESOURCE PROJECTS DESIRED BY NON-FEDERAL PUBLIC BODIES]. WHEREAS, the Government is authorized under 33 U.S.C. Section 2232 (Sections 204(b) and (c) of Public Law 99-662), to accept and expend cash contributions;

[FOR ACCEPTANCE OF CONTRIBUTED FUNDS AND CONTRIBUTED FUNDS, OTHER, IN THE AMOUNT OF \$2,000,000 OR LESS, WHERE FEDERAL FUNDS HAVE BEEN APPROPRIATED FOR FEDERAL PROJECT WORK TO WHICH THE PROPOSED NON-FEDERAL WORK RELATES, AND FOR THE PURPOSE OF DREDGING NON-FEDERAL BERTHING AREAS AND CHANNELS/SLIPS OR TO DISPOSE OF DREDGED MATERIAL IN A BENEFICIAL MANNER (I.E., NON-FEDERAL BEACH NOURISHMENT OR WETLAND DEVELOPMENT) UNDER THE FOLLOWING CONDITIONS: (1) THE CONTRIBUTED FUNDS ARE NOT TO BE USED TO IMPLEMENT OR MAINTAIN ANY PORTION OF A FEDERAL PROJECT FOR WHICH A FEDERAL CONTRIBUTION IS AUTHORIZED; AND (2) THE PROPOSED NON-FEDERAL WORK WILL BE ACCOMPLISHED AS PART OF THE MAINTENANCE DREDGING OF THE FEDERAL NAVIGATION PROJECT ASSOCIATED WITH THE PROPOSED NON-FEDERAL WORK]. WHEREAS, the District Engineer, **[LOCATION OF DISTRICT]**, is authorized under authority delegated by the Secretary of the Army/Assistant Secretary of the Army for Civil Works to accept **(Contributed Funds/Contributed Funds, Other)** in the amount of \$2,000,000 or less for work dealing with non-Federal requests for dredging non-Federal berthing areas and channels/slips or to dispose of dredged material in a beneficial manner (i.e., non-Federal beach nourishment and wetland development), where Federal funds have been appropriated for Federal project work to which the proposed non-Federal work relates, under the

following conditions: (1) the contributed funds are not to be used to implement or maintain any portion of a Federal project for which a Federal contribution is authorized; and (2) the proposed non-Federal work will be accomplished as part of the maintenance dredging of the Federal navigation project associated with the proposed non-Federal work; and to execute MOAs associated therewith;

NOW, THEREFORE, the Government and Contributor agree as follows:

1. Subject to any necessary appropriation, the Contributor shall contribute to the Government the following sums, in cash: **[ITEMIZE AND SPECIFY THE CASH AMOUNT(S)]**.

2. The contributions specified in paragraph 1 above shall be made as follows: **[ITEMIZE AND SPECIFY THE TERMS/TIMING OF THE PAYMENT(S); FOR INSTANCE, THE FOLLOWING OFFERS THE NON-FEDERAL SPONSOR TWO MECHANISMS FROM WHICH TO CHOOSE IN DECIDING HOW TO PROVIDE ITS CASH CONTRIBUTION TO THE FEDERAL GOVERNMENT. THE NON-FEDERAL SPONSOR SHOULD INDICATE ITS CHOICE DURING THE COURSE OF NEGOTIATING THE AGREEMENT. THE MOA SHOULD REFLECT ONLY ONE MECHANISM.]** [1] provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, **[APPROPRIATE USACE DISTRICT]**" to the District Engineer. [2] verify to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor **[ESCROW AGREEMENTS MUST FOLLOW THE MODEL IN APPENDIX B, AS EXPLAINED IN PARAGRAPH 12 OF THIS ER AND IN ER 37-2-10, OR BE FORWARDED TO HQUSACE FOR REVIEW]**.

3. In the event that the Contributor contributes more or less than the amount listed in paragraph 1 above, or makes its contributions earlier or later than the dates listed in paragraph 1 above, this MOA shall apply to whatever funds are contributed by the Contributor to the Government pursuant to this MOA; however, the Government shall not obligate any contributed funds before they are received and available.

4. The Government shall use all **[Contributed/Advanced]** funds for **[SELECT ONE: design, construction, maintenance or operation]** of the Project, except with regard to excess **[Contributed/Advanced]** funds which are addressed in paragraph 7 of this MOA. **[FOR ACCEPTANCE OF FUNDS IN CONNECTION WITH O&M ACTIVITIES: The Contributor shall bear all additional costs of the work for which funds are accepted including any additional environmental compliance costs]**.

5. The Government shall provide the Contributor with quarterly accountings of its expenditures of **[Contributed/Advanced]** funds for **[SELECT ONE: design, construction, maintenance or operation]**. The first such accounting shall be provided within 30 days after the final day of the first complete Government fiscal year quarter following receipt of the **[Contributed/Advanced]** funds, and subsequent accountings shall be provided within 30 days after the final day of each succeeding quarter until the **[Contributed/Advanced]** funds are completely expended or the

Government concludes [**SELECT ONE: design, construction, maintenance or operation**] on the Project.

[USE THE FOLLOWING TWO PARAGRAPHS FOR CONTRIBUTED FUNDS:]

6. Unless directed in law, the Government shall not reimburse the Contributor for contributed funds expended by the Government.

7. The Government shall not credit the Contributor for the contributed funds so as to reduce the cash contribution that otherwise would be required of the Contributor pursuant to any Project Cooperation Agreement entered into by the Government and Contributor (or a legal entity empowered to act on behalf of the Contributor) governing the construction of all or part of the Project.] **[OR]**

[USE THE FOLLOWING TWO PARAGRAPHS FOR ADVANCED FUNDS:]

6. If and only if the Government and the Contributor (or a legal entity empowered to act on behalf of the Contributor) enter into a Project Cooperation Agreement governing the construction of all or part of the Project, the Government shall credit the Contributor for the advanced funds so as to reduce the cash contribution that otherwise would be required of the Contributor pursuant to the Project Cooperation Agreement.

7. The Government shall not reimburse the Contributor for advanced funds expended by the Government unless funds for that purpose are appropriated.]

8. The Government, subject to the availability of funds and subject to the approval by the Secretary of the Army, shall return to the Contributor [**contributed/advanced**] funds not expended by the Government.

9. Nothing herein shall constitute, or be deemed to constitute, an obligation of future appropriations by the United States.

10. Nothing herein shall constitute, or be deemed to constitute, an assurance or promise of the Government to take any action whatsoever with respect to the project, including but not limited to the following actions: entering into a Project Cooperation Agreement with the Contributor; constructing the Project; including the Project in the Government's budget; or completing the [**SELECT ONE: design, construction, maintenance, or operation**] of the Project.

11. Before any party to this MOA may bring suit in any court concerning an issue relating to this MOA, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

12. The Contributor shall hold and save the Government free from all damages arising from the design, construction, operation, maintenance, repair, replacement, and rehabilitation of the Project and any Project-related betterments, except for damages due to the fault or negligence of the Government or its contractors.

13. Federal and State Laws. In the exercise of their respective

rights and obligations under this MOA, the Contributor and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulations 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

14. Relationship of Parties. In the exercise of their respective rights and obligations under this MOA, the Government and the Contributor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

15. Officials Not to Benefit. No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this MOA, or to any benefit that may arise therefrom.

16. Notices.

a. Any notice, request, demand, or other communication required or permitted to be given under this MOA shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Contributor: **[FULL ADDRESS]**

If to the Government: **[FULL ADDRESS]**

b. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this paragraph.

c. Any notice, request, demand, or other communication made pursuant to this paragraph shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven days after it is mailed.

17. Confidentiality. To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

IN WITNESS WHEREOF, the parties have executed this MOA as of the day, month, and year first above written.

THE DEPARTMENT OF THE ARMY

[THE CONTRIBUTOR]

BY: _____

BY: _____

**[DISTRICT ENGINEER
FOR CONTRIBUTED FUNDS WITHIN
LIMITS OF DELEGATED AUTHORITY]**

**[NAME AND TITLE OF AUTHORIZED
REPRESENTATIVE OF CONTRIBUTOR]**

**[ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS) FOR ADVANCED FUNDS,**

AND FOR CONTRIBUTED FUNDS NOT
WITHIN LIMITS DELEGATED TO
DISTRICT ENGINEERS]

CERTIFICATE OF AUTHORITY

I, _____, do hereby certify that I am the principal legal officer of the [FULL NAME OF NON-FEDERAL SPONSOR], that the [FULL NAME OF NON-FEDERAL SPONSOR] is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the [FULL NAME OF NON-FEDERAL SPONSOR] in connection with the [FULL NAME OF "PROJECT"], and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the [FULL NAME OF NON-FEDERAL SPONSOR] have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 19____.

[SIGNATURE]
[TYPED NAME]
[TITLE IN FULL]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

 [SIGNATURE OF MOA SIGNATORY]

[TYPED NAME]

[TITLE IN FULL]

DATE: _____

